Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage	WC Docket No. 18-155

REPLY COMMENTS OF VERIZON[1]

The record evidence confirms widespread support for Commission action to eliminate access arbitrage. Only the access stimulators themselves oppose reform, because it would end their uneconomical and inefficient schemes that benefit them at the expense of consumers. The Commission should wait no longer to complete the transition to bill-and-keep for all telecommunications traffic—a transition it began in 2011. Completing this transition would eliminate incentives for intercarrier compensation arbitrage once and for all. In the interim, the Commission's proposed targeted solution to access arbitrage should curtail bad behavior.

I. Only the Arbitrageurs Oppose Reform.

Access arbitrage "impos[es] significant harms on the industry and undermin[es] the Commission's intercarrier compensation (ICC) regime."[2] It is an "abuse[] of the intercarrier compensation ("ICC") system"[3] that "harm[s] consumers, undermine[s] broadband deployment, and distort[s] competition."[4]

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[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

[2] CenturyLink Comments at 1.

[3] NTCA Comments at 1.

[4] *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, WC Docket No, 18-155, FCC 18-68, ¶ 1 (rel. June 5, 2018) ("*NPRM*").

It should therefore be no surprise that the Commission's intent to eliminate access arbitrage enjoys wide support in the record from a broad cross-section of industry players. These include NTCA, Sprint, Inteliquent, NCTA, AT&T, T-Mobile, ITTA, CenturyLink, and Verizon. And many of these entities supported the joint proposal to target access arbitrage described in the *NPRM*.[5]

The few opponents of reform, not surprisingly, profit from access stimulation at the expense of consumers and competition. They mischaracterize the *NPRM* and either ignore or disagree with the Commission's longstanding policies in favor of eliminating inefficiencies from the intercarrier compensation system.

For example, these proponents of traffic pumping disparage the Commission's reform efforts and falsely attempt to paint the *NPRM* as doing the bidding of large long distance providers. A group of well-known traffic pumpers calling itself the "Competitive Local Exchange Carriers" asserts "the Commission has decided to instead create a false narrative to justify a patchwork solution that will appease AT&T and Verizon."[6] Similarly, another well-known arbitrageur, Teliax, says the Commission should not "amend its rules solely for the benefit of AT&T and Verizon."[7] But the Commission's efforts to stamp out access arbitrage draw widespread support from leading trade associations representing cable companies and rural LECs, wireless providers, Inteliquent, Windstream, Frontier, and CenturyLink, in addition to AT&T and

[5] *See* Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, CenturyLink, WTA, and USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Apr. 11, 2018); *see also NPRM* ¶¶ 21-22.

[6] BTC, Inc. d/b/a Western Iowa Networks, et al. Comments at 68 ("Competitive Local Exchange Carriers").

[7] Teliax Comments at 7.

Verizon. This broad cross-section of industry has urged the Commission to eliminate the inefficient arbitrage practices traffic pumpers seek to preserve.

With its consumer-harming arbitrage practices in the Commission's sights, Teliax has somehow concluded that Congress in the Telecommunications Act of 1996 intended for regulatory arbitrage to exist[8]–pure fantasy, with no support in the legislative history (and Teliax cites none). And the CLEC group devotes 75 pages of comments to defending access stimulation.

But the Commission and the industry now have more than a decade of experience dealing with access stimulation, and the Commission has consistently found it harmful. In 2011, the Commission found wasteful arbitrage schemes had proliferated throughout the industry[9] and "cost carriers and ultimately consumers hundreds of millions of dollars annually."[10] Access stimulation, the Commission found, "inefficiently divert[s] capital away from more productive uses such as broadband deployment."[11] And while the proponents of traffic pumping argue that their business models enable "free" services that customers rely upon, in reality the Commission has found those services, which are fueled by access stimulation, "harm[] competition by giving companies that offer a 'free' calling service a competitive advantage over companies that charge their customers for the service…. [T]he services offered by 'free' conferencing providers that leverage opportunities put companies that recover the cost of services from their customers at a distinct competitive disadvantage."[12] And those companies "are forced to recover these costs from all their

[8] *See* Teliax Comments at 15-16.

[9] See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, ¶ 9 (2011) ("*Transformation Order*").

[10] *Id*. ¶ 33.

[11] *Id*. ¶ 662.

[12] *Id*. ¶ 665.

customers, even though many of those customers do not use the services stimulating the access demand."[13]

The opponents of reform and proponents of traffic pumping also ignore that the Commission's intercarrier compensation policy, including a national bill-and-keep framework, is meant to eliminate implicit subsidies and "limit carriers' ability to recover their own costs from other carriers and their customers."[14] So when traffic pumpers like Western Iowa Networks claim they could not have made investments without access-stimulation revenues, they ignore the Commission's well-grounded 2011 directive that "each carrier will 'recover' its costs from its own end users or from explicit support mechanisms…. [N]etwork costs would be recovered by carriers' customers supplemented as necessary by explicit universal service support, rather than from other carriers."[15]

II. Complete the Transition to Bill and Keep.

The Commission's policy that carriers will recover costs from their end-user customers and not from their competitors forms the basis of the national framework it adopted in 2011, with its end state of bill-and-keep for all telecommunications traffic. Completing the transition to that end state would be the most effective way to eliminate access arbitrage. And while the interim steps the Commission proposes in the *NPRM* represent improvements, as Sprint notes, "[a] partial transition … is a second-best alternative" that "leaves the door open for on-going abuses."[16] AT&T commented that "unscrupulous carriers will continue to engage in regulatory arbitrage and

[13] *Id.*¶ 656.

[14] *Id.*¶ 745.

[15] *Id.*¶ 775.

[16] Sprint Comments at 3.

other misconduct" until the Commission completes that transition.[17] We agree. And because these carriers "have shifted their arbitrage schemes to the portions of the PSTN-related intercarrier compensation regime that have not yet been reformed to bill-and-keep," the need to complete the transition to full bill-and-keep "has become increasingly urgent."[18]

Some commenters ask the Commission to wait. But the Commission has already waited seven years since the 2011 *Transformation Order*. NTCA suggests the Commission should defer any decision on transitioning to bill-and-keep until it considers issues related to the network edge and other issues.[19] But the Commission has a complete record on the network edge, and it needs no additional process before it moves forward.[20] "[T]he only tangible way to stop all forms of arbitrage," as AT&T notes, "is to move to bill-and-keep."[21] The time to begin that transition is long overdue.

III. The Proposed Fix Targeting Access Arbitrage Is a Good Interim Step.

The traffic pumpers' comments call the Commission's widely supported proposal "a death warrant for access-stimulating CLECs."[22] That should give the Commission all the comfort it needs to adopt its proposal as an interim step while it completes the transition to bill-and-keep. And arguments against the proposal are unavailing.

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[17] AT&T Comments at 20.

[18] *Id*. at 20-21.

[19] NTCA Comments at 8-9.

[20] *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, Public Notice, 32 FCC Rcd 6856 (2017) (the "Notice").

[21] AT&T Comments at 5.

[22] Competitive Local Exchange Carriers Comments at iv.

The Commission has authority to adopt its proposal. It is not, as its opponents portray it, a requirement to provide a direct connection.[23] Consistent with the *Local Competition Order*'s determination that the Act does not require CLECs to provide direct interconnection,[24] the proposal continues to give access stimulators the option of providing direct or indirect interconnection. If they refuse to provide direct interconnection, however, financial consequences ensue. There is no conflict between the proposal and either the *Local Competition Order* or the Act.

Some commenters support the first prong of the Commission's proposal but not the second. The first prong, as NTCA commented, is "analogous" to the industry proposal that was "designed to remove the financial incentives to engage in access stimulation."[25] AT&T supports the first prong, under which an access stimulating LEC "can choose to be financially responsible for calls delivered to its network so it, rather than interexchange carriers (IXCs), pays for the delivery of calls to its end office or the functional equivalent."[26] But it argues the second prong needs modification, because access-stimulating LECs could avoid financial responsibility for delivering calls to their end offices "*simply* via an offer to IXCs to connect directly at their end offices," which "would make the IXCs responsible for all the additional costs of establishing direct connection and the delivery of the access stimulation traffic."[27] CenturyLink, too, comments that the second prong "places unwarranted costs on IXCs" and may lead to abuse.[28]

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[23] *See id*. at 60.

[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15,499 (1996) ("*Local Competition Order*").

[25] NTCA Comments at 2.

[26] AT&T Comments at 2.

[27] *Id*. at 3.

[28] CenturyLink Comments at 6.

In our comments we supported the Commission's proposal as an interim step because lond distance providers would not be responsible for tandem switching or transit charges imposed by LECS or interim providers they did not choose, and because it is consistent with the principle that the carrier making the routing decision should be responsible for the financial consequences. And we noted the Commission's proposal is consistent with the industry proposal. AT&T and CenturyLink, however, make important points about the potential for abuse that the second prong of the Commission's proposal presents. That potential arises because the proposal would give the access stimulating LEC the option to avoid financial responsibility. That could give access stimulators new opportunities to abuse the system by, for example, "locating the POI where a direct connection is either not available or only available at an exorbitant price," or by locating interconnection points at remote areas with high transport costs.[29]

We support the modification AT&T proposes—to eliminate the second prong from the proposed rule or modify it so that the access stimulating LEC bears the full cost of a direct connection—and agree that this would enhance the Commission's efforts to stop access arbitrage.

IV. A Carrier Customer Does Not Violate the Communications Act When It Disputes and Withholds Payment of Tariffed Charges.

Several commenters used their submissions to criticize what they have labeled "self-help." Companies like O1, Peerless, and Teliax—all of whom have are in active disputes with IXCs about the validity of their access billing—criticize carriers for withholding disputed charges, and Teliax asks the Commission to "end self-help."[30]

Although this issue is unrelated to access arbitrage and the NRPM, commenters now have raised it here and in Dockets 10-90 and 01-91. Teliax, O1, and Peerless have urged the

[29] *See* AT&T Comments at 12-13.

[30] Teliax Comments at 16.

Commission to endorse two recent, erroneous federal court rulings: *CenturyTel of Chatham, LLC v. Sprint Communications Co.*[31] and *Peerless Network, Inc. v. MCI Communications Services, Inc.*[32] Because those companies continue to raise the issue—and because those cases were wrongly decided—the Commission should clarify that they are inconsistent with decades of Commission precedent holding that a customer failing to pay charges allegedly due under a carrier's tariff does not violate the Communications Act.

In *CenturyTel*, the Fifth Circuit held that, by withholding payments based on its newly raised disputes about tariffed switched access charges it had previously paid to CenturyLink, Sprint violated not only CenturyLink's tariff — because the Fifth Circuit concluded the disputed amounts were actually due — but also the Communications Act.[33] That ruling was incorrect. Only a common carrier can violate the Communications Act,[34] and the Act provides that a company "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."[35] The Commission has squarely held that, when it purchases tariffed services from another carrier, a carrier-customer is acting "in its role as a customer" — and not as a carrier.[36] This is why, in an unbroken line of precedent dating back to 1989, the "Commission has never held that a failure to pay tariffed charges violates the Act itself."[37]

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[31] 861 F.3d 566 (5th Cir. 2017).

[32] No. 14-C-7417, *slip op.*, 2018 WL 1378347 (N.D. Ill. Mar. 16, 2018).

[33] *See CenturyTel*, 861 F.3d at 576-77.

[34] *See* 47 U.S.C. §§ 206-208.

[35] *Id.* § 153(51).

[36] *All Am. Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723, ¶ 12 (2011) ("*All American*").

[37] *Id.* ¶ 13.

The Fifth Circuit did not address 47 U.S.C. § 153(51) or the Commission's holding that a long-distance carrier purchasing tariffed services acts "in its role as a customer" and, therefore, cannot violate the Act. Instead, the court thought it was relevant that Sprint was withholding payments based on disputes of amounts that it had previously paid rather than only newly billed amounts.[38] That is a distinction without a difference. Regardless of its reason for not paying CenturyLink's tariffed switched access invoices, Sprint was acting "in its role as a customer" and, therefore, could violate CenturyLink's tariff but not the Communications Act. In addition, a carrier that bills switched access charges in violation of its tariff violates the Communications Act[39] and, therefore, has no right to keep amounts it improperly billed.[40] A customer does not engage in improper conduct when it raises a dispute about previously paid charges and withholds those amounts. Customers withhold payment at their own risk. If the customer loses on its dispute, it will owe both withheld amounts and late payment charges, which often are as high as 18% per year. The cost of withholding payment based on a non-meritorious dispute is substantial.

Peerless is equally wrong insofar as it went beyond *CenturyTel* and suggested that the filed-rate doctrine means a customer has no right to dispute and withhold even currently billed amounts where it claims that a carrier has violated its tariff.[41] There is no support for that position. As a threshold matter, tariffs normally allow customers to withhold amounts in exactly that

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[38] *CenturyTel*, 861 F.3d at 576-77

[39] *AT&T v. YMax*, Memorandum Opinion and Order, 26 FCC Rcd 5742, ¶ 34 & n.105 (2011) ("*YMax Order*").

[40] *MCI WorldCom Network Servs., Inc. v. PAETEC Communications, Inc.*, No. 04-1479, at 11-13, 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 F. App'x 271 (4th Cir. 2006) (per curiam).

[41] *Peerless*, No. 14-C-7417, at 37, 2018 WL 1378347, at *16-17.

situation, as the Commission has recognized.[42] The filed-rate doctrine enforces those provisions that authorize the disputing and withholding of tariffed charges. Nor has the Commission ever suggested that such withholding violates the Communications Act.

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[42] *See YMax Order* ¶ 48 n.134 ("YMax's Tariff expressly contemplates that a customer may withhold payment of disputed charges while YMax pursues resolution."); *see also* Peerless Network, Inc., Access Service Tariff, FCC Tariff No. 4, § 3.6.3(C)(1) (authorizing customer to "withh[o]ld payment of the disputed amount pending resolution of the disputed bill"); Teliax Colorado, LLC, Interstate Access Service, Tariff FCC No. 1, § 2.10.1 (similar); O1 Communications, Access Services Tariff, FCC Tariff No. 4, § 2.10.4 (similar).